IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 405 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

RABARI NATHA DEVAYAT

Appearance:
1. Criminal Appeal No. 405 of 1985
MR RM CHAUHAN, ld.APP for appellant
MR G RAMAKRISHNAN for Respondents

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 09/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The appellant - State of Gujarat in this appeal has challenged the legality of the judgment and order dated 31.1.1985 passed by the learned Sessions Judge, Junagadh, in Sessions Case No.62 of 1984, acquitting the respondents-accused for the offences punishable under Sec.302 read with Sec.34 of IPC. Both the respondents

were charged for the offences punishable under Sec.302 individually as well under Sec.302 read with Sec.114 of IPC and also under Sec.504 of IPC.

2. The facts giving rise to the prosecution case are as under:

Deceased Ruda Devayat, Rabari by caste, is a resident of village Jalodar, Taluka Malia-Hatina. The respondents-accused are his brother and nephew respectively. Deceased and Respondent no.1 Natha Devayat, who is brother of the deceased reside in the same village separately and on account of family affairs, they were not in good terms. On this account, respondent no.1 Natha Devayat with his family left the village house and started residing in a house in his field. The agricultural lands of the deceased as well as respondent no.1 are adjoining to each other and at the time of the incident, groundnut crop was standing in the field of the deceased. It is the prosecution case that respondent accused no.1 let loose his cattle in the field of the deceased on the day of the incident, i.e. 10.5.1984. On seeing this, the deceased had, at about 9.00 a.m., reached the house of accused no.1 and asked as to why the cattle are spoiling his crop. This was followed by oral exchange and abuses between the deceased and accused no.1. Accused no.1 thereafter came out with a stick and accused no.2, respondent no.2, came with an axe and started assaulting the deceased. It is the prosecution case that accused no.2 attempted a blow of axe on the head of the deceased and the deceased moved back. However, the deceased was injured by the blunt portion of the axe which hit on the forehead of the deceased. Accused no.1 inflicted stick blow on the back portion of the thigh of the deceased and another blow by axe by accused no.2 causing injury on a finger of right hand. On account of number of blows of stick, the deceased became unconscious and after some time when he regained consciousness, he started walking with difficulty back towards his home and crossed about 2 fields, he fell down and lost consciousness. It is alleged that in the vicinity of the house of accused no.1, there is residential house of Devraj Sanga, who resides with his family. Another person, Uka Ebha resides in the opposite direction of his house on the back of a culvert and some one of these people might have seen the incident. However, as the deceased was injured on his forehead, he was almost half conscious and he does not know if any of them saw this incident. Until the deceased was brought to the hospital, he remained unconscious. However, he regained consciousness after treatment. He gave the FIR

which was recorded by the duty Police Head Constable, Veraval Municipal Hospital at about 12.30 p.m. On the basis of the FIR, an offence was registered at Malia Police Station. Initially, the investigation was carried out by PSI, Mr.Jadeja, however, later on, Dy.SP Mr.Rabari took over the investigation and also completed the same.

3. On completion of the investigation, the police submitted the charge sheet against the accused in the Court of learned JMFC, Malia, who committed the accused to stand trial in the Court of Sessions at Junagadh. The charge Exh.1 was framed against the accused. They pleaded not guilty to the same and claimed to be tried. The defence was of total denial. The learned Sessions Judge, Junagadh, after appreciating the evidence on record, at the end of the trial, recorded a finding that the prosecution has failed to establish that on 10.5.1984 at about 7.30 in the morning, the accused had common intention of causing death to Ruda Devayat and with that intention accused no.1 assaulted the deceased with stick and accused no.2 assaulted the deceased with axe causing injuries to the deceased, thereby causing his death and thus they committed an offence punishable under Sec.302 of IPC individually and an offence under Sec.302 read with Sec.34 of IPC. The learned trial Judge, accordingly acquitted both the respondents-accused. Hence, the State has filed the present appeal.

4. Learned APP Mr.Chauhan appearing for the appellant State has taken us through the entire evidence on record. He submitted that the learned trial Judge has committed an error in acquitting the accused. In the submission of learned APP, the prosecution has established the guilt against the accused beyond reasonable doubt, taking into consideration the oral evidence as well as the Dying Declaration at Exh.31. Mr.G.Ramakrishnan, learned Counsel appearing for the respondents-accused, on the other hand, supported the judgment of the trial Court in toto.

5. As far as the present case is concerned, there is no direct evidence inasmuch as the prosecution has not produced any evidence in the form of eye witnesses and has mainly placed reliance on the evidence of supported witnesses. PW8-Exh.38 - Karman Ruda is the son of the deceased. He in his evidence has stated that on the day in question, he had returned to his home from the field in the morning and inquired from his brother, Gogan, about his father, to which, he was informed that father had gone to the field. At that time, one Deva Uka came there and informed that their father was beaten by the

accused and was lying near the field of one Arjan Rama. On hearing this, both the brothers went to the said place of incident and saw their father lying profusely bleeding. Blood was oozing out from the head as well from the forehead. He sent his brother Gogan for bringing a cart. Their father was taken in the cart to the village where his uncle Kala Manda was also informed about the incident. Preliminary treatment was given at Amrapura Govt. Hospital. Thereafter, the injured was taken to Malia Dispensary. From there, the injured was taken to Veraval Govt. Hospital in a rickshaw. The injured was admitted in the Govt. Hospital at Veraval. According to this witness, his father, throughout during the journey, had remained unconscious, however, on regaining consciousness in the Hospital when the treatment was given, he informed that he was beaten by both the accused with stick as well as axe. Kala Manda, PW9-Exh.40, Ruda has corroborated the evidence of Karman Ruda, however, Deva Uka who conveyed the information about the incident and the involvement of the accused to Karman Ruda has not been examined by the prosecution. Therefore, both these witnesses could not have known about the involvement of the accused in commission of the offence. Even though these witnesses had taken the deceased to Veraval Hospital when he was admitted at about 12.30 p.m., they did not convey any information about the involvement of the accused.

Bodha Naja PW5-Exh.32, Gala Mulu PW6-Exh.33 and Mansukh Uka PW7-Exh.34 who could have thrown some light regarding the involvement of the accused in commission of the offence, have not supported the prosecution and were declared hostile.

Dr.M.R.Dodiya PW2-Exh.25, Assistant Medical Officer of Municipal General Hospital, Veraval, who has given treatment to the deceased in the hospital, has admitted in his cross examination that in his case papers, he has written the history as given out by the deceased as "assault by somebody", Not only that, but Dr.Dodiya has also conveyed the information through Nurse Yadav to the Veraval City Police Station that Rabari Ruda Devayat has been admitted in the hospital because of the injuries sustained by him due to commotion. This information has been conveyed to the Executive Magistrate by PSO, Veraval City Police Station vide Exh.30. Admittedly, Karman Ruda PW8-Exh.39 and Kala Manda, PW9-Exh.40 have accompanied the deceased to the hospital and as such, they could have known the names of the accused and could have conveyed to the Doctor and the duty Constable at the hospital. Since no such

information is conveyed, it can be considered that they were also not knowing about who the assailants were.

6. The prosecution, however, in the instant case, has heavily placed reliance on the Dying Declaration at Exh.31 alleged to have been recorded by Bharatdas Nimayat PW4-Exh.29, Executive Magistrate. After getting the police yadi at Exh.30, at 12.25 p.m. from the hospital, he had gone to the hospital, he enquired about the condition of the patient from the Doctor. The Doctor informed him that the patient is conscious, he started recording the Dying Declaration of the deceased at about 12.35 p.m. and completed the same at 12.45 p.m. He has stated that the Dying Declaration was read over to the injured and the injured put his thumb impression on the same and this witness also put his signature on it. He has also stated that the Doctor has also signed it endorsing the injured was conscious. We have carefully examined the Dying Declaration at Exh.31 which is in question answer form. The deceased has also answered all questions put to him. It clearly involves both the accused by stating that Natha Deva and his son Petha have beaten him. He has also stated that he was given blows by axe and stick, however, he is not sure as to who caused injury with what weapon, but he remembers that Petha (accused no.2) was having axe. On being asked as to who brought him to the hospital, he has stated that Karman, his son has brought him to the hospital.

Mr.Ramakrishnan, learned Counsel appearing for the respondents-accused submitted that looking to the condition of the deceased, he could not have given all the details in the Dying Declaration and could not have made the Dying Declaration. He submitted that the Dying Declaration at Exh.31 does not inspire confidence as the Doctor has not stated in terms that the deceased was in a fit state of mind to give the statement. He, therefore, submitted that no reliance can be placed on the Dying Declaration. We find considerable substance in the submission of learned Counsel appearing for the respondents-accused.

Dr.Dodiya, PW2-Exh.25 who has examined the deceased when the deceased was admitted in the hospital at 11.30 a.m. found the following external injuries:

(1) A stitched wound 1/2" in length with contusion of 2" x 2" in size, just above 1/2" of medial end of right eye-brow,

brown-black coloured.

(2) A stitched wound 1/2" in length with contusion 2" x 2" in size, just 1/2" above the middle of left eye-brow.

(3) A stitched wound 1" in length, transverse-oblique over left forehead, 3/4" above the medial and of left eye-brow.

(4) A contusion 1-1/2" x 1" transversely situated over the forehead, mid-part, brown-black coloured.

(5) A stitched wound 3/4" in length on segital line, between two external ears and contused swelling, brown-black coloured.

(6) A stitched wound 1-1/2" in length, vertical, 1/2" away from segital line and 2" behind right external ear, over right parietal region.

(7) A contused lacerated wound 1/4" x 1/8", skin-deep, over right index finger.

(8) An abrasion mark, 4" x 1/4" in size over left thigh.

(9) An abrasion mark 3" x 1/4" over right thigh.

Dr.Dodiya has further stated that as per Column 18 of the post mortem notes, he found general appearance of forehead depressed, and clinically he found fracture of frontal-bone, to have been depressed. All the nine external injuries were ante-mortem injuries. On internal examination, Dr.Dodiya has found the following injuries:

There was a huge haematoma 7" x 3" in size under injury nos.1 to 4 externally. There was fracture of frontal bone in irregular shape and direction. Depressed fracture pieces were found internally. There was fracture of left eye-box bone. Meninges congested. There was laceration of brain tissue. Under injury nos.1, 2, 3 and 4 externally, extra-dural haemorrhage was found in the brain. No other internal injury was found. The heart was full of blood in all chambers. Large vessels were collapsed. The cause of death was shock due to

laceration of brain tissue and intra-cranial (extra-dural) haemorrhage caused by the fracture of the frontal bone due to head injury.

7. In view of the medical evidence on record which shows the huge haematoma 7" x 3" in size and that there was a fracture of frontal bone in irregular shape and direction, and depressed fracture pieces were found internally, we have got our own doubt as to the physical as well as mental condition of the deceased at the time of giving the Dying Declaration. The Doctor has also admitted that when the injured was brought to the hospital, he was in a serious condition. He has also stated that looking to the seriousness of the patient, he ought to have recorded the Dying Declaration, but he did not. Dr.Dodiya, in his evidence, has clearly admitted that the brain is the controlling centre of all senses of human being and the sense of speech is controlled by the brain. In view of this admission, when the frontal portion of the deceased was 1/2"cm depressed and that his skull was badly damaged, that there was a fracture of left eye box bone, that there was laceration of brain tissues and that there was extra-dural haemorrhage found in the brain, we wonder how the deceased could have made the oral statement before the Executive Magistrate! Merely because Dr.Dodiya has stated that the patient was conscious that fact by itself will not lead us to conclude that the deceased was physically and mentally in a position to make declaration before the Executive Magistrate. In absence of such evidence on record, it is not possible for us to accept the Dying Declaration of the deceased and we are not prepared to accept it as true and reliable.

8. In the case of Smt.Laxmi v. Omprakash, reported in AIR 2001 SC 2383, the Apex Court has ruled that the Court should be satisfied that the deceased was in a fit state of mind and can be of making the statement when the Dying Declaration was made and/or recorded. On the facts and circumstances of the case, it is not possible for us to hold that the deceased was in a fit state of mind and can be of making statement when the Dying Declaration was recorded. On the contrary, considering the facts of the case, the only conclusion can be drawn is that the deceased could not have made the Dying Declaration taking into account the injuries sustained by him.

Even though Dr.Dodiya has endorsed below the Dying Declaration at Exh.31 that the deceased was conscious throughout when his Dying Declaration was recorded, he has not mentioned the timings and the dates

below his signature. The very Dying Declaration is also produced later on by the investigating officer, Dy.S.P. Mr.Rabari, PW10-Exh.41 vide Exh.43. Surprisingly, Dr.Dodiya's signature is not there below the endorsement, "patient was conscious during Dying Declaration was taken" and on the contrary, such endorsement is attested by the Mamlatdar, Veraval. This raises a serious doubt regarding the genuineness of the Dying Declaration. If this Dying Declaration is taken out, nothing serious against the accused connecting them in the involvement in the offence in question.

9. Taking overall view of the matter, we do not see any merits in this matter. Needless to say we are in total agreement with the reasonings and the ultimate conclusion recorded by the learned trial Judge acquitting the respondents-accused. There being no substance in this appeal, the same is dismissed.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)

Sreeram.